No. 18780

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLARKE E. DAVENPORT,

Appellant,

v.

MUTUAL OF OMAHA INSURANCE COMPANY
and CONTINENTAL CASUALTY COMPANY,

Appellees.

APPELLEES' BRIEF

Appeal from the United States District Court for
the District of Oregon

THE HONORABLE WILLIAM T. BEEKS, Judge

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STATEMENT OF THE CASE

In order to correct the omissions and inaccuracies in the portion of appellant's brief containing his statement of the case, appellees deem it necessary to make the following statement:

A. Nature of the action.

This is an action brought by appellant to recover damages for alleged fraud.

The action involves two policies of health and accident insurance issued to appellant, one by each appellee. However, appellant has expressly disavowed any claim based upon those policies (R. 17). Instead, he seeks to recover damages resulting from appellees' alleged fraud in obtaining releases of purported claims under the policies, after which appellant voluntarily permitted the same to lapse (R. 16-20).

Appellant asserts that, by reason of the alleged fraud, he lost certain anticipated benefits he would otherwise have obtained under the policies, i.e., $900 on the policy issued by appellee Continental Casualty Company, and $1,120 on the policy issued by appellee Mutual of Omaha Insurance Company (R. 17, 18). He seeks to recover $100,000 in actual and punitive damages (R. 20).

By reason of the contentions contained in the pretrial order, one question before the District Court was whether diversity jurisdiction existed in this case. In this connection, the issue was whether appellant's claim was for less than the amount required to confer jurisdiction on the United States District Court in a diversity action. Thus, appellees contended that the amount in controversy did not exceed $10,000 (R. 21, 22), and appellant contended that the same was $100,000 (R. 20), $2,020 as actual damages and the remainder as punitive damages.

B. Nature of the judgment.

This action came on for trial on March 18, 1963, before The Honorable William T. Beeks, sitting with a jury (Tr. 1). After plaintiff rested his case, appellees renewed their previous motion to strike appellant's allegations relative to punitive damages. They further moved, in the event the foregoing motion should be allowed, that the cause be dismissed for lack of jurisdiction (Tr. 83-86). These motions were granted (Tr. 97-98, R. 28).

March 19, 1963, the court entered its judgment of dismissal (R. 29-30), which provided in part as follows (R. 30):

> "it is hereby
>
> "ORDERED AND ADJUDGED that plaintiff's claim for exemplary damages be and the same hereby is stricken on the grounds and for the reason that there is no evidence supporting said claim; plaintiff's contentions for punitive damages are sham and frivolous and were made in bad faith without any foundation or justification whatsoever. It is further
>
> "ORDERED AND ADJUDGED that the above-entitled action be and the same hereby is dismissed for lack of jurisdiction by this court."

C. Question presented on appeal.

The following question is presented for decision on this appeal:

Did the District Court correctly dismiss this action?

D. Summary of Facts.

The following facts appear from the agreed facts of the pretrial order and from the transcript of testimony:

August 25, 1951, appellee Continental Casualty Company issued a policy of health and accident insurance to appellant. A second policy was issued to him on December 20, 1951, by appellee Mutual of Omaha Insurance Company. Both policies were in effect during September and October, 1959 (R. 15).

In 1954, appellant consulted Dr. Merlin Harvey Johnson, a Portland, Oregon, ophthalmologist, concerning blurred vision of the right eye. July 8, 1959, he consulted Dr. Johnson with respect to discomfort in his eye. On both occasions glasses were prescribed (Tr. 4-5, 36).

Thereafter, appellant consulted Dr. Carroll, a "drugless practitioner" in Seattle. The latter advised appellant to return to Dr. Johnson for further examination as he believed something to be wrong with appellant's eye (Tr. 6).

November 13, 1959, appellant again visited Dr. Johnson. On that occasion, Dr. Johnson told him he had a detached retina of the right eye (Tr. 6-7, 37), and advised immediate surgery (Tr. 7, 45-46). In this connection, Dr. Johnson advised appellant that his eye condition was very serious and that without treatment he would lose his vision. He stated that even with treatment appellant might lose his vision and that delay would increase this possibility (Tr. 43). Dr. Johnson advised appellant that his condition was not due to an accident, but was a sickness (Tr. 51-53).

December 14, 1959, appellant filed a notice and proof of loss with each appellee, claiming benefits for disability (R. 15-16).

After filing his claims with appellees, appellant authorized each of them to interview his physician (Tr. 12). Accordingly, representatives of both appellees interviewed Dr. Johnson orally. He advised them that appellant had a retinal detachment which required surgery (Tr. 38-41). The information given appellees by Dr. Johnson was the same as that which he had already given to appellant (Tr. 49).

In January, 1960, Francis E. LaFrance, claims adjuster for appellee Mutual of Omaha Insurance Company (Tr. 76), called on appellant, bringing a check in the sum of $150 as a proposed settlement of appellant's purported claim and a release for appellant's signature should he wish to accept such settlement (Tr. 12-14). Appellant had not then met LaFrance, nor had he discussed the matter with him or any other representative of appellee Mutual of Omaha (Tr. 57). Appellant had, however, read his policy (Tr. 56), and, as indicated hereinabove, he had been fully apprised of his condition by Dr. Johnson.

LaFrance believed that appellant's claim was not covered by his company's policy and so advised appellant. Appellant's condition was not caused by accident and he was not continuously and totally disabled so as to come within the coverage for sickness except for a very short period. LaFrance further advised appellant that the company would make a compromise settlement (Tr. 78). Accordingly, on January 13, 1960, appellee Mutual Benefit of Omaha Insurance Company paid appellant the sum of $150 in return for his execution of a full and final release (R. 16). Appellant read the release prior to signing it (Tr. 56).

Thereafter, Raymond F. Landgraf, local claims manager of appellee Continental Casualty Company (Tr. 73), called on appellant. He advised appellant that his claim was not covered by the policy issued by appellee Continental Casualty Company (Tr. 16-18). Appellant had read this policy (Tr. 58), and of course had the information given him concerning his condition by Dr. Johnson. As a result of this visit, appellee Continental Casualty Company on January 30, 1960, paid appellant the sum of $250 in return for the execution of a full and final release (R. 16). Again, appellant had read the release prior to signing the same (Tr. 59).

Thereafter, appellant voluntarily allowed his policies to lapse for nonpayment of premiums. The policy issued by appellee Continental Casualty Company expired no earlier than December 1, 1959, and the policy issued by appellee Mutual of Omaha Insurance Company expired no earlier than January 30, 1960 (R. 16).

Later in 1960, appellant's condition worsened (Tr. 22). As a result, he underwent surgery on July 25, 1960, September 15, 1960, September 29, 1960, and October 26, 1960 (Tr. 23).

ARGUMENT

The District Court properly dismissed this action.

This is a strange case. In it, appellant seeks to invoke the diversity jurisdiction of the United States District Court on a claim for $100,000 compensatory and punitive damages, the compensatory damages amounting to $2,020. However, under

The District Court properly dismissed this action.

This is a simple case. In it, appellant seeks to invoke the diversity jurisdiction of the United States District Court on a claim for $100,000 compensatory and punitive damages. The compensatory damages pleading do $2,000. However, under

appellant's pleadings and proof, there is absolutely no basis for recovery of punitive damages by him. His attempt to invoke federal diversity jurisdiction is, therefore, a travesty.

Under the circumstances, the judgment of the United States District Court dismissing the action must be affirmed.

A. A diversity action must be dismissed if it appears from the pleadings or proof that the plaintiff was never entitled to recover the jurisdictional amount.

Of course, the United States District Courts have diversity jurisdiction in civil actions where the matter in controversy exceeds $10,000, exclusive of interest and costs.

28 USCA Section 1332

This jurisdictional requirement is satisfied by proof of a good-faith demand in excess of the jurisdictional amount.

Allman v. James Healing Company (D NJ, 1956) 142 F Supp 673, 679

> "* * * the jurisdictional requirement is satisfied by proof of a good faith demand in excess of $3,000." (Emphasis added)

However, if it appears from the pleadings or proof that a plaintiff was never entitled to recover the amount claimed, and therefore that his claim was colorable for the purpose of conferring jurisdiction, the action must be dismissed.

St. Paul Mercury Indemnity Co. v. Red Cab Co. (1937) 303 US 283, 289-290, 82 L ed 845, 848-849

> "* * * if, from the face of the pleadings, it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed or if, from the proofs, the court is satisfied to a like certainty that the plaintiff never was entitled to recover that amount, and that his claim was therefore colorable for the purpose of conferring jurisdiction, the suit will be dismissed."

plaintiff a pleading and proof, which is absolutely no basis for recovery of punitive damages by him. His attempt to invoke federal diversity jurisdiction is, therefore, a travesty.

Under these circumstances, the judgment of the United States District Court dismissing the action must be affirmed.

XI. A diversity action must be dismissed if it appears from the pleadings or proof that the plaintiff was never entitled to recover the jurisdictional amount.

Of course, the United States District Court has diversity jurisdiction of civil actions where the matter in controversy exceeds $10,000, exclusive of interest and costs.

28 U.S.C. Section 1332

This jurisdictional requirement is satisfied by proof of a good-faith demand in excess of the jurisdictional amount. Albion v. Home Indemnity Company, 18 Ill. 1959, 143 F. Supp 193, 196:

> "* * * the jurisdictional requirement is satisfied by proof of a good faith demand in excess of $10,000." (Emphasis added)

However, if it appears from the pleadings or proof that a plaintiff was never entitled to recover the amount claimed, and therefore that his claim was colorable for the purpose of conferring jurisdiction, the action must be dismissed. St. Paul Mercury Indemnity Co. v. Red Cab Co. (1938) 303 US 283, 289-290, 82 L ed 845, 58 S Ct 586:

> "* * * if, from the face of the pleadings, it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed or if, from the proofs, the court is satisfied to a like certainty that the plaintiff never was entitled to recover that amount, and that his claim was therefore colorable for the purpose of conferring jurisdiction, the suit will be dismissed."

Lynn v. Smith (WD Penn, 1961) 193 F Supp 887, 894

> "This court is satisfied to a certainty that from the proofs offered by plaintiff at the trial of his case he was never entitled to recover the jurisdictional amount. From the start his claim was therefore colorable for the sole purpose of conferring diversity jurisdiction. * * * To permit this plaintiff and his counsel to enlarge a neighborhood Justice of the Peace dispute over a boundary line into a federal case is simply to emasculate the diversity statute. Plaintiff never did have a $10,000 lawsuit. The diversity jurisdiction of the Federal court cannot be invoked simply by a demand made by a plaintiff in the addendum clause that the amount in controversy exceeds $10,000, when the proofs at the trial show to a legal certainty that an award of even one-half of the necessary jurisdictional amount would have been excessive. Such is this case. The evidence in this case requires a dismissal of this civil action even after the case has been tried. It will be so ordered."

B. If punitive damages are not recoverable, the same cannot be included in determining the jurisdictional amount.

It needs no citation of authority to show that punitive damages may be included in determining the jurisdictional amount if such damages are legally recoverable. However, a contrary rule obtains if the plaintiff cannot legally recover such damages.

Thompson v. Mutual Benefit Health & Accident Ass'n (ND Iowa, 1949) 83 F Supp 656, 658

> "The question involved is whether the amount in controversy exceeds the sum of $3,000 exclusive of interest and costs. Exemplary damages in a complaint may be included in computing the amount necessary for federal court jurisdiction. Young v. Main, 8 Cir., 1934, 72 F.2d 640. However, if under the applicable state law it would be legally impossible to recover actual and exemplary damages in the amount required for federal court jurisdiction, a claim in a complaint for the required amount will not confer jurisdiction. 1 Cyclopedia of Federal Procedure, 2d Ed., 348."

"This court is satisfied, to a certainty, that from the proofs offered by plaintiff at the trial of his case he was never entitled to recover the jurisdictional amount. From the start his claim was therefore colorable for the sole purpose of conferring diversity jurisdiction. * * * To permit this plaintiff and his counsel to enlarge a neighborhood squabble of the lesser dispute over a boundary line into a federal case is simply to emasculate the diversity statute. Plaintiff never did have a $10,000 lawsuit. The diversity jurisdiction of the federal court cannot be invoked simply by a demand made by a plaintiff in the ad damnum clause that the amount in controversy exceeds $10,000, when the proofs at the trial show to a legal certainty that an award of even one-half of the necessary jurisdictional amount would have been excessive. Even if this were true, the evidence in this case requires a dismissal of this suit even after the case has been tried. It will be so ordered."

D. If punitive damages are not recoverable, the same cannot be included in determining the jurisdictional amount.

If there is no question of authority to award such punitive damages and be included in determining the jurisdictional amount if such damages are legally recoverable. However, a contrary rule obtains if the plaintiff cannot legally recover such damages.

Thompson v. Schell Lumber Co., (N.D. Iowa, 1949) 84 F. Supp. 650, 653

The question involved is whether the amount in controversy exceeds the sum of $3,000 exclusive of interest and costs. Exemplary damages in a complaint may be included in computing the amount necessary for federal court jurisdiction. Young v. Main, 8 Cir., 1933, 72 F.2d 640. However, if under the applicable state law it would be legally impossible to recover actual and exemplary damages in the amount required for federal court jurisdiction, a claim in a complaint for the required amount will not confer jurisdiction. 1 Cyclopedia of Federal Procedure, 2d Ed., 317.

Deming v. Buckley's Art Gallery (WD Ark., 1961) 196 F Supp 247

This was an action to recover $6,554 actual damages and $5,000 punitive damages. The court concluded that the plaintiff could not recover punitive damages under the applicable law, that of the state of Arkansas, and therefore dismissed the action for lack of jurisdiction.

The pertinent inquiry is, therefore, whether the punitive damages claimed by appellant are legally recoverable. The answer is unquestionably "No."

C. The pleadings and proof in this case show that appellant was never entitled to an award of punitive damages.

As a diversity court in effect sitting in the state of Oregon, this court is, of course, bound to follow the principles of law enunciated by the Oregon Supreme Court. Consequently, the question of whether punitive damages were ever legally recoverable by appellant is to be determined under the law of that state.

1. Appellant did not allege or prove the actual damages necessary to support a claim for punitive damages.

In order to recover punitive damages, appellant must first show that he has suffered actual damages.

Martin v. Cambas (1930)
134 Or 257, 261, 293 P 601,
603

The measure of damages in a fraud case is the value of the plaintiff's property or right relinquished at the time of the alleged fraud.

Automobile Underwriters, Inc.
v. Rich (1944) 222 Indiana 384,
53 NE2d 775

Appellant does not claim any loss at the time of the taking of the releases. The loss, he claims, occurred six months later. Accordingly, he did not suffer the actual damages necessary to support a claim for punitive damages in an action for fraud.

2. The facts of this case do not justify an award of punitive damages.

At the outset, it must be noted that punitive damages are awarded only if precedent requires the allowance of such damages.

Perez v. Central Nat'l Ins. Co. (1958) 215 Or 107, 110, 332 P2d 1066, 1067

> "The doctrine of punitive damages viewed in the most favorable light is subject to criticism. Van Lom v. Schneiderman, supra. It should not be extended past the point to which our precedents commit us."

Appellant has cited no case which would permit recovery of punitive damages in this case. Nor could he do so. There is no Oregon precedent for an award of punitive damages under facts such as those involved in this case. In fact, the Oregon court has refused such recovery in similar cases. Thus, punitive damages will not be awarded in a fraud case unless the fraud is accompanied with extraordinary or exceptional circumstances of aggravation clearly indicating malice and willfulness.

Cays v. McDaniel et al (1955) 204 Or 449, 457-458, 283 P2d 658, 661-662

> "Punitive damages are not a favorite of the law. The primary concern of the law is the payment of just compensation for the wrong done. Although in proper cases punitive damages are allowable, nevertheless, the tendency of the courts is to restrict rather than to extend their allowance. It is quite well established by the authorities that punitive damages are not allowable in cases of simple fraud; to be allowable, the fraud must be an aggravated one, as where it is gross, malicious, or wanton. * * *
>
> "We are of the opinion, therefore, that punitive damages are not recoverable in an action of damages for fraud and deceit, unless the fraud is accompanied by extraordinary or exceptional circumstances of aggravation clearly indicating malice and willfulness.
>
> "It is elementary that a complaint must allege facts sufficient to authorize the relief sought by a plaintiff. To be entitled to punitive damages in any case, it is necessary that plaintiff allege in his complaint the material facts justifying such allowance. If a plaintiff relies upon circumstances of aggravation as the basis of his claim for punitive damages, those circumstances must be alleged in the complaint. In Stark v. Epler, 59 Or 262, 266, 117 P 276, we quoted with approval the following from the opinion in Samuels v. Railroad Company, 35 SC 493, 501, 14 SE 943, 28 Am St Rep 883:
>
> > "'To entitle the plaintiff to exemplary damages, he must not only prove the elements that enter into and make up this cause of action, but he must in the first place in his complaint set up distinctively the elements that made up his cause of action, and if he fails to do so, his complaint should be dismissed.'" (Emphasis added)

Consonant with this pronouncement, the Oregon court has declined to permit recovery of punitive damages in the following cases, which are analogous to that at bar:

Perez v. Central Nat'l Ins. Co. (1958) 215 Or 107, 332 P2d 1066

This was an action to recover actual and punitive damages for conversion of an automobile by the defendant

insurance company ("Central"), acting through its agent ("Owen"), an insurance adjuster.

Central had issued a $50 deductible policy on the automobile, which became a total loss in a collision. Without being authorized to do so, Owen sold the wrecked automobile to the highest bidder for $166.49.

Thereafter, the plaintiff met with Owen's agent, one Thompson, to discuss settlement under the policy. She introduced evidence that Thompson attempted to obtain her signature on the settlement papers by threats that she would " get in trouble" if she did not sign. The plaintiff characterized Thompson's conduct as "high-handed."

In that case, the Oregon Supreme Court affirmed the trial court's order setting aside a judgment for punitive damages. Its comment is quoted hereinabove (supra, page 10).

Ridgeway v. McGuire (1945) 176 Or 428, 158 P2d 893

This was an action against a real estate broker ("McGuire") and one of his salesmen ("Rossman") to recover an alleged secret profit.

In October, 1942, the plaintiffs listed certain real property with McGuire for sale at a price of $2,750. In November, 1942, Rossman told them he could not sell the property for the listed price, but that he had a prospective purchaser who would pay $1,950. The plaintiffs, who were inexperienced and uninformed as to property values, consented to such sale. Unknown to them, Rossman himself bought the property and sold the same for a $1,800 profit.

The Oregon Supreme Court affirmed judgment on a verdict for the plaintiff on the grounds that (1) McGuire and Rossman failed to disclose for whom Rossman bought the property, and (2) they owed a duty to secure the highest price for the plaintiff. Furthermore, it affirmed the trial court's elimination of the plaintiff's punitive damage claim.

Of course, the facts in the foregoing cases are more flagrant than those involved in the case now before the court. Thus, as indicated hereinabove (supra, pages 3-6), this case presents the following factual situation:

Appellant held health and accident policies issued by appellees. In November, 1959, his physician advised him that he suffered from a detached retina of the right eye. At that time, the doctor fully advised appellant as to his condition. He told him that the same was extremely serious, requiring immediate surgery; that if he was not treated he would surely go blind; and that even with treatment, this might occur. The doctor also told appellant that his condition was caused by sickness, not accident.

Thereafter, appellant filed claims on his policies. In this connection, he authorized appellees to call on his physician for information as to his condition. They did so, and were advised of the facts which appellant already knew. All their information was obtained from appellant's doctor and was known to appellant.

Appellees' representatives then called on appellant. First, he met with LaFrance, claims adjuster for appellee

Mutual of Omaha Insurance Company. Prior to this occasion, LaFrance and appellant had never met. Appellant had not discussed his claim with LaFrance or any representative of his company. He had, however, read his policy.

LaFrance believed that appellant's claim was not covered by his company's policy, and so advised him. LaFrance suggested that the company would be willing to negotiate a compromise settlement. This was agreed upon, and appellant received a $150 check in exchange for a release which he read before signing.

After these events, appellant had an almost identical meeting with Landgraf, who represented appellee Continental Casualty Company. At that time, he accepted a $250 check in exchange for a release, which he again read before signing.

Subsequent to the execution of the releases, appellant permitted his policies to lapse for nonpayment of premiums, and still later he was required to undergo surgery.

Certainly this does not reveal any gross, malicious or wanton conduct on the part of appellees. Viewing the facts in the light of the applicable law, it is clear that appellant was never entitled to recover punitive damages. His claim for such damages is sham.

In addition, there is another reason why punitive damages are not recoverable in this case. When appellant brought this action, he had two choices. He could have (1) brought an action on his policies, and, when the releases were asserted in defense thereof, requested that the same be set

aside on grounds of fraud, or (2) disregarded the policies and brought an action for fraud in obtaining the releases. He chose the latter course. If he had instead pursued the former, the releases would not have been set aside. In such an action, appellant could at most have urged that the releases were improvident. The facts of this case would permit him to go no further. Under these circumstances, the law of Oregon would not have permitted the court to cancel the release.

Wheeler v. White Rock Bottling Co. (1961) 229 Or 360, 367, 366 P2d 527, 530

> "* * * while we are mindful of the trend elsewhere toward treating releases as binding only when they do not result in hardship, we believe that our own decisions and previous choices of competing policy considerations require us to reject mere improvidence as a plausible ground for setting aside otherwise unimpeachable contracts."

As the releases could not be set aside, the Oregon court surely would not permit punitive damages in an action arising out of the execution of the same.

The words of the District Court aptly summarize the defects in appellant's position (Tr. 97-98):

> "I am at a loss to understand the factors which prompted plaintiff to bring this action in this court, instead of in the State court, which is a court of general jurisdiction. This court is well-known to be a court of limited jurisdiction. In a case such as this, there must be a diversity of citizenship, which exists here, and the amount in controversy must in good faith exceed the amount of $10,000, and here the jurisdiction of this court is dependent upon the contention that the plaintiff is entitled to punitive damages; in other words, that the alleged fraud to which he was subjected must be of an aggravated character indicating malice or willfulness. It must be gross, malicious, or wanton.

[illegible]

[illegible]

[illegible] the referee would have learned nothing. In such an action appellant could at best have urged that the referee was improvident. The facts of this case would compel him to go no further. Under these circumstances, the law of Oregon would not have permitted the court to direct the verdict.

<u>[illegible] (1961) [illegible]</u>

> [illegible] while we are mindful of the trend elsewhere toward upholding releases as binding only when [illegible] we believe that our own decisions and previous [illegible] of [illegible] policy considerations as to [illegible] improvidence as a [illegible] ground for setting aside [illegible] contracts.

If the releases would not be set aside, the Oregon court surely would not permit punitive damages in an action arising out of the execution of the same.

The words of the District Court aptly summarize the defense to appellant's position (TR. 57-58):

> I am at a loss to understand the factors which prompted plaintiff to bring this action in this court, instead of in the State court, which is a court of general jurisdiction. This court is well-known to be a court of limited jurisdiction. In a case such as this, there must be a diversity of citizenship, which exists here, and the amount in controversy must in good faith exceed the amount of $10,000, and here the jurisdiction of this court is dependent upon the contention that the plaintiff is entitled to punitive damages; in other words, that the alleged fraud to which he was subjected must be of an aggravated character indicating malice or wilfulness. It must be gross, malicious, or wanton.

"It is the opinion of the Court that such an element is entirely lacking here. There is not a scintilla, not an iota of evidence to support it. It is my view that the contentions of plaintiff with respect to punitive or exemplary damages as set forth in paragraph V of plaintiff's contentions in the pretrial order are sham and frivolous, that they were made in bad faith as a matter of law if not in fact, that they were irresponsibly made, and they are without any foundation or justification whatsoever. They are at best a figment of someone's imagination. It is my opinion that this court is without jurisdiction of the matter in controversy.

"It is, therefore, the order of the Court that the action be dismissed for lack of jurisdiction, with costs to both defendants."

CONCLUSION

For the reasons set forth hereinabove, this court should affirm the judgment of the District Court dismissing this action.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CLIFFORD N. CARLSEN, JR.

Of Attorneys for Appellee,
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